

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT  
COMPLIANCE PROGRAMS, UNITED  
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No.: 2017-OFC-00004

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JAN 24 2017

Office of Administrative Law Judges  
San Francisco, Ca

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION  
TO REMOVE THE ADMINISTRATIVE COMPLAINT  
FROM THE EXPEDITED HEARING PROCEDURES,  
OR IN THE ALTERNATIVE, GRANT LIMITED DISCOVERY**

Defendant Google Inc. ("Google"), by and through its undersigned counsel and pursuant to 41 C.F.R. § 60-30.2, respectfully submits the following Memorandum in Support of Its Motion to Remove the Administrative Complaint from the Expedited Hearing Procedures, Or in The Alternative, Grant Limited Discovery.

**SUMMARY OF ARGUMENT**

Google is entitled to the removal of this matter from the expedited hearing procedures or to limited discovery for the following reasons:

*First*, OFCCP has refused to explain to Google why the information requested is relevant to the matter under investigation and pertinent to Google's compliance with Executive Order 11246. This information is critical not only for Google to evaluate whether its rights under these standards are being violated, but also necessary for this Court to ultimately render a decision as to

whether these standards have been satisfied and whether OFCCP, as Defendant contends, failed to conciliate any alleged violations in good faith. Accordingly, under an expedited hearing process neither Google nor this Court can assess whether the requests are justified under the pertinent legal standards, including OFCCP's own internal guidelines and the standards for the issuance of an administrative subpoena under the Fourth Amendment.

*Second*, Google is entitled to discovery regarding the necessity of the expansive scope of the outstanding requests—discovery not otherwise permitted in the expedited hearing process. Specifically, OFCCP seeks information beyond the one year period under review without providing any explanation for doing so. Google is entitled to discover information regarding what basis, if any, OFCCP has for seeking such information.

*Third*, because the disputed data is incredibly voluminous, Google is entitled to discovery regarding the reasonableness of the requests in light of the applicable law and OFCCP's enforcement needs. Requiring Google to produce such data without appropriate justification violates Google's Fourth Amendment Rights.

*Fourth*, because Google cannot assess whether the requests are justified under the relevant legal standards, Google has reason for concern that it is being improperly singled out in violation of the law. Google is entitled to discover whether information exists evidencing this concern.

The ultimate question of whether this Court will order Google to produce the newly requested compensation data will turn almost entirely on information and documents only in OFCCP's possession. It is well established that in adjudicating Fourth Amendment cases, the Court must review the evidence to determine issues such as whether the standard for an administrative subpoena has been satisfied or whether the party from whom the government seeks information has enough information regarding whether to consent to the search. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 320-21 (1978) (holding that judicial review of whether agencies properly followed a neutral administrative plan for the selection of audit sites is necessary to protect Fourth Amendment Rights). Without adequate discovery, including a limited number of requests for production of documents, interrogatories, and depositions, not only will Google be

unable to obtain information necessary to defend itself, but the Court will lack sufficient evidence to render a decision in this matter.

Removing this matter from the expedited hearing process will permit Google to obtain discovery necessary to establish its defenses to OFCCP's allegations and develop a factual record sufficient to enable the Court to evaluate the lawfulness of OFCCP's requests. Google requests removal from the expedited hearing track because those procedures preclude basic forms of discovery, such as requests for production of documents and interrogatories. In addition, the expedited procedures only allow for depositions upon Court approval following a finding of good cause. In the alternative, Google requests that this Court exercise its discretion under 41 C.F.R. § 60-30.2 and grant Google basic discovery within the framework of the expedited (or otherwise modified) hearing procedures.

Google has a strong interest in an expeditious resolution of the pending OFCCP audit. Towards that end, Google has spent significant time and resources complying with OFCCP's multiple requests and continues to do so during the pendency of this administrative proceeding. Google already has provided OFCCP with *in excess of 7.5 million items of data and over 271,000 documents*. Google's ongoing compliance has been met with increasingly burdensome requests. Indeed, OFCCP now seeks in excess of two million additional items of data. Much of this data covers a period of time well outside the timeframe subject to review in the current Compliance Evaluation. Given the increasing burden, as well as the morphing scope of OFCCP's ongoing requests, Google reasonably has sought verification of the basis for OFCCP's additional requests. However, these good faith attempts have been summarily denied at every step.

Finally, OFCCP's decision to invoke the expedited hearing procedures is inconsistent with the pace of its processing of this matter and its review and analysis of the data Google already has provided. OFCCP has received data from Google consistently since November 2015. OFCCP's claim that despite its own internal failure to complete its review and analysis of the provided data, Google must proceed in this matter on an expedited basis (thus depriving Google of critical discovery tools), strains credulity.

## STATEMENT OF FACTS

1. On September 30, 2015, OFCCP sent a Scheduling Letter to Google announcing a Compliance Evaluation of Google's Mountain View Facility. *See* Duff Aff., ¶ 2, Ex. A.<sup>1</sup> In response to the Scheduling Letter, Google submitted individualized compensation data for more than 21,000 employees—approximately 650,000 data points in total. *See Id.*, ¶ 3. OFCCP subsequently made a series of requests for additional information and documentation from Google. Google provided the requested data in full. *See Id.*

2. Following a two-day onsite review, OFCCP sent two separate requests for additional information and documentation to Google. Google provided complete responses to the first set of requests, which sought additional information relating to Google's hiring practices. *See Id.*, ¶ 4.

3. OFCCP's second set of post-onsite requests sought, among other items: (1) thirty-six additional data points for each of Google's 21,114 employees in its September 1, 2015 workforce; (2) a second compensation database for each of Google's 19,538 employees in its September 1, 2014 workforce, including all factors previously requested, and the thirty six new compensation data points requested for the current year snapshot; and (3) nineteen additional document requests relating to both compensation and non-compensation personnel policies. These requests included, without limitation, the name, personal contact information, complete salary and job history, education, prior experience, prior salary, date of birth, competing offers and locality for all of Google's employees as of September 1, 2015 and September 1, 2014. *See Id.*, ¶ 5, Ex. B.

4. In response to the new and incredibly voluminous requests, Google reasonably requested information regarding OFCCP's need for the additional information. OFCCP responded that it "was not able to let [Google] know exactly what [OFCCP] was looking at." *See Id.*, ¶ 6.

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<sup>1</sup> "Duff Aff." refers to the Affirmation of Daniel V. Duff, III, filed concurrently herewith.

5. Google also requested that OFCCP at least identify the particular areas (*e.g.*, job title or job groups) where OFCCP was seeing issues (*e.g.*, gender, race or ethnicity issues). OFCCP responded that it had “no findings it was able to share,” and that it would not limit the scope of its requests in any way whatsoever. *See Id.*, ¶ 7.

6. On June 17, 2016, Google again requested further information regarding OFCCP’s new requests. OFCCP flatly responded that “at this stage of the Compliance Evaluation, OFCCP is unable to share any preliminary findings or internal analyses.” *See Id.*, ¶ 8, Exs. C-D.

7. On June 30, 2016, Google wrote to OFCCP requesting a teleconference to address Google’s concerns regarding the new requests. *See Id.*, ¶ 9, Ex. E.

8. On September 2, 2016, Google supplemented its disclosures, set forth a schedule for additional supplemental disclosures, and listed those items it remained unable to produce due to OFCCP’s failure to provide any reasonable basis for their disclosure. Google again requested any basis that would justify the additional disclosures. OFCCP failed to provide such justification. *See Id.*, ¶ 10, Ex. F.

9. Google has never denied OFCCP access to any requested information. To the contrary, Google has asked only that OFCCP articulate the relevance of the outstanding requests so that it can properly evaluate whether OFCCP has complied with the standards for the issuance of an administrative subpoena. Notwithstanding Google’s good faith requests, OFCCP has refused to provide Google with any explanation. As discussed below, OFCCP’s recalcitrance necessitates the relief requested in this motion.

## ARGUMENT

### **I. The Limited Discovery Allowed under the Expedited Hearing Procedures Is Insufficient to Obtain Evidence Necessary for Google’s Defenses to OFCCP’s Allegations.**

Under the expedited hearing procedures, discovery in this action is limited only to requests for admission. 41 C.F.R. § 60-30.33(a). Depositions are permitted only upon motion and the Court’s finding of “good cause.” 41 C.F.R. § 60-30.33(c). Otherwise, “[o]ther discovery will not be permitted.” *Id.* This limitation precludes Google from obtaining materials and information

from OFCCP that will be critical to the Company's defense in this action. Examples of the defenses and corresponding types of discovery required by Google are outlined below.<sup>2</sup>

**A. Discovery Related to OFCCP's Failure to Meet Its Own Regulatory Standards and the Fourth Amendment Standards Applicable to Administrative Subpoenas, and/or the Reasons Google Has Been Subjected to Heightened Scrutiny.**

OFCCP's regulations require that "[e]ach contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material *as may be relevant to the matter under investigation and pertinent to compliance* with [Executive Order 11246]." 41 C.F.R. § 60-1.43 (emphasis added). Further, OFCCP's requests for information are subject to the Fourth Amendment constitutional standards for administrative subpoenas set forth in *Oklahoma Press Publishing v. Walling*, 327 U.S. 186 (1946) and its progeny. See *United Space Alliance, LLC v. Solis*, 824 F.Supp.2d 68, 91 (D.D.C. 2011) (applying the administrative subpoena standard in a denial of access case brought by OFCCP). Thus, "when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome. *Id.* at 91, citing *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984). "The gist of the protection is in the requirement, *expressed in terms*, that the disclosure sought shall not be *unreasonable*. *Id.* at 91, citing *Oklahoma Press*, at 66 S. Ct. at 505 (other citations omitted) (emphasis added).

Without the limited discovery sought through this motion, Google (and ultimately, the Court) will be unable to determine whether OFCCP has complied with applicable legal standards and OFCCP's own regulations and internal guidelines in connection with the outstanding information requests. Indeed, the mere issuance of information requests by an administrative

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<sup>2</sup> Because the purpose of the instant motion is to obtain adequate discovery to support its legal defenses, and is not an occasion for briefing of the legal defenses themselves, Google by no means provides a complete briefing of the legal arguments and authorities upon which it will rely in defense of Plaintiff's denial of access allegations. Google expressly reserves the right to brief the legal arguments fully as appropriate in this action, and to raise any defenses and legal arguments even if not identified herein.

agency “in no way leaves an employer defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents.” *Id.*, citing *Lone Steer, Inc.*, 104 S. Ct. at 773. Rather, an employer must be afforded protection “by *allowing [it] to question the reasonableness of the subpoena*, before suffering any penalties for refusing to comply with it, *by raising objections in an action in district court.*” *Id.* at 92 (emphasis added). Here, Google is requesting basic discovery which would allow it to analyze the reasonableness of the information requests and object (or provide responsive information) appropriately.

OFCCP’s failure to articulate even the most basic enforcement concerns necessitates the discovery requested by the instant motion. An administrative subpoena must be “sufficiently limited in scope” and “specific in directive so that compliance will not be *unreasonably burdensome.*” *United Space Alliance*, 824 F.Supp.2d at 91 (emphasis added). The reasonableness of the scope of the administrative subpoena is in turn tied to the “specific enforcement needs” of the agency seeking the information. *Marshall v. Barlow*, 436 U.S. 307, 320 (1978). The requested discovery will allow Google to determine whether the scope of OFCCP’s requests is proper in the context of the ongoing compliance review.

OFCCP’s lack of transparency leaves Google in a difficult position—incur the significant burdens of producing all the information and data OFCCP has requested, thereby potentially waiving its right to object, or protect its Fourth Amendment rights by ensuring that OFCCP complies with the standards applicable to administrative subpoenas as set forth above. *See EEOC v. County of Hennepin*, 523 F.Supp. 29, 31-32 (D. Minn. 1985) (failure to object to an administrative subpoena can act as a waiver of objections); *OFCCP v. Bank of America*, 97-OFC-16; 2004 WL 24270087, at \* 8 (A.R.B. Mar. 31, 2003) (under the Fourth Amendment, “[i]t is important that the decision to enter and inspect...not be the product of unreviewed discretion of the enforcement officer in the field.”). If granted, the discovery requested in this motion will allow Google (and the Court) to properly assess the central issue in this case—whether OFCCP is attempting to violate Google’s rights under OFCCP’s regulatory provisions and/or the Fourth Amendment.

Here, OFCCP repeatedly has refused to articulate to Google *any* explanation for why the outstanding requests are reasonable and are relevant to its Compliance Evaluation. Accordingly, Google seeks the following discovery:

- Written information, documentation and communications by and/or within OFCCP regarding the expansion of the scope of Google's Compliance Review following the onsite review, including information regarding findings, if any, leading to such expansion (excluding communications with counsel).
- Written information, documentation and communications by and/or within OFCCP regarding the decision to seek information beyond the one year review period (excluding communications with counsel).
- The identity of OFCCP personnel involved in the decision to expand the scope of Google's Compliance Review following the onsite review (other than counsel).
- Depositions of relevant OFCCP personnel regarding the decision to expand the scope of Google's Compliance Review following the onsite review.

**B. Discovery Related to OFCCP's Failure to Conciliate.**

Under Section 209(b) of Executive Order 11246, OFCCP had a duty to conciliate in good faith with Google before bringing this action. Indeed, Executive Order 11246 itself explicitly requires OFCCP to "make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section . . . ." Executive Order No. 11246, 30 Fed. Reg. 12319 (Sept, 24, 1965), sec. 209, as amended.

Google's affirmative defense that OFCCP failed to discharge this duty necessitates the requested discovery. Google made several reasonable proposals that would have afforded OFCCP relevant compensation data while at the same time addressing Google's legitimate concerns that the demands amounted to a violation of its Fourth Amendment rights, and that compliance with such requests would result in a waiver of these rights. OFCCP has rejected Google's good faith proposals. In response, Google has clarified the proposals and offered additional suggestions.



However, OFCCP has completely failed to respond adequately to Google's reasonable requests for information.

In response to Google's requests, OFCCP has offered only vague explanations such as it "was not able to let [Google] know exactly what [OFCCP] was looking at" and that it had "no findings it was able to share." See Duff, ¶¶ 6-7. Despite the fact that these unclear communications raised more questions than they answered, OFCCP required Google to accept their representations and simply trust (without verification) that OFCCP had legitimate reasons for continuing to expand the scope of its investigation. See *EEOC v. Agro Distrib., LLC*, 442 F. Supp. 2d 357, 363 (S.D. Miss. 2006) (finding that "[i]t appears the Commission dealt in an arbitrary manner based on preconceived notions of its investigator and ignored the attempts of [Defendants'] counsel to engage the Commission in settlement discussions.").

OFCCP cannot argue that its failure to engage in a meaningful dialogue with Google was reasonable and responsive under these circumstances. To this end, Google seeks the following discovery:

- Written communications within OFCCP regarding consideration of Google's proposals (excluding communications with counsel).
- Identity of OFCCP personnel involved in considering Google's proposals (other than counsel).
- Depositions of relevant OFCCP personnel regarding their consideration of Google's proposals.

## **II. Relevant Legal Precedent Supports Removal of This Matter from the Expedited Hearing Procedures.**

The decision as to whether a particular matter is appropriate for the expedited hearing procedures is well within the sound discretion of this Court. See Order and Notice of Hearing, *OFCCP v. Bank of America Tech. and Ops., Inc.*, 2006-OFC-00003, at 1 (Oct. 4, 2006) and Order Granting Motion to Remove from Expedited Hearing Procedures, Granting Document and Other Discovery, and Notice of Hearing, *OFCCP v. The Boeing Co.*, 1999-OFC-14, at 3 (Aug. 16, 1999). In *Bank of America*, Administrative Law Judge Jeffrey Tureck ruled that the limited discovery

provided by the expedited hearing procedures would not permit the contractor to determine the basis for the selection of one of its facilities for a compliance review. 2006-OFC-00003, at 1. In *Boeing*, Administrative Law Judge Stuart A. Levin ruled that the expedited hearing procedure's limitation on discovery "threatens due process" and permitted the contractor to conduct discovery. 1999-OFC-14, at 5.

In both cases, OFCCP's representations as to the selection criteria for the audit were proven to be false based on the evidence the contractor was permitted to gather through discovery. In *Boeing*, for example, OFCCP selected Boeing facilities for an audit based on unspecified "community concerns" during extended discussions with Boeing to settle a different audit. *OFCCP v. The Boeing Co.*, 1999-OFC-14, at 4 (Aug. 16, 1999).

In *Bank of America*, OFCCP told Administrative Law Judge Tureck in its brief in opposition to the motion to remove the case from an expedited hearing that "[h]ere there are simply no factors to suggest that Plaintiff did anything but follow the neutral administrative plan it provided to Defendant." *Bank of America, N.A., v. Solis et al*, No. 1:09-cv-2009-EGS, Resp. to Def.'s Mot. to Remove the Admin. Compl. from the Expedited Procedures, at 6, Apr. 8, 2010, ECF No. 17-3. After removing the matter from the expedited procedures, permitting discovery, and hearing evidence, Judge Tureck concluded that "I find that OFCCP has failed to meet its burden to prove that it actually applied its neutral administrative plan to select or reject 30 contractors" for audit. Recommended Order Enforcing On-Site Review, *OFCCP v. Bank of America*, 2006-OFC-00003, at 11 (May 22, 2007).

Similar to *Bank of America* and *Boeing*, there are several factors in the instant matter that call into question the credibility of OFCCP's representations and decision to request that this matter be heard pursuant to the expedited procedures:

- OFCCP has refused to provide a clear explanation of how it analyzed Google's initial compensation data and why it decided to request additional data. Rather, OFCCP has flatly stated that it "was not able to let [Google] know exactly what [OFCCP] was looking at" and that it had "no findings it was able to share." See Duff., ¶¶ 6-7.

- Google has informed OFCCP that it is not seeking extensive discovery. Rather, Google seeks more discovery than the mere request for admissions allowed by the expedited rules. If this Motion were granted, Google likely would seek no more than ten to fifteen document requests, ten interrogatories, and no more than four or five depositions. Again, Google has informed OFCCP of its reasonable requests, attempted to meet and confer with OFCCP to come to agreement, but has been rejected without explanation.
- If this matter were placed on a normal calendar, Google believes it would take approximately six to eight months to resolve. Given OFCCP's representation that it has not yet completed analysis of the data already provided, there is no reasonable possibility that it could complete the current compliance review within even this period of time. Indeed, given: (1) the wide scope of the data provided already; (2) the fact that the additional production Google has already agreed to provide will take several months to produce; and (3) the fact that OFCCP still has not conducted a substantive onsite review to examine specific issues, it seems likely that OFCCP will not complete its compliance review *until 2018 at the earliest*.
- Many OFCCP audits involving much smaller workforces than Google's Mountain View facility have taken OFCCP multiple years to complete.

Accordingly, this Court should remove the Complaint from the expedited hearing process to permit Google to conduct discovery necessary to defend itself against OFCCP's allegations. *See* 41 C.F.R. § 60-30.2 (granting to the Administrative Law Judge the power to "modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby").

### **III. The Requested Discovery Can Be Completed Expeditiously and Will Not Prejudice OFCCP.**

As noted above, the requested discovery specifically relates to defenses Google will assert in this action and can be accomplished expeditiously. Google will act flexibly and reasonably in attempting to avoid unnecessary discovery by entering into stipulations of fact with OFCCP. Moreover, OFCCP can control the pace of discovery, as determined by the Agency's ability to produce the requested materials, information and witnesses for depositions.

As noted above, Google has a considerable interest in the expedited resolution of the pending audit. However, a more reasonable timetable will afford Google an opportunity to develop evidence needed to defend itself against OFCCP's allegations, and provide the Court the record that it will need in order to render a decision in this matter. Nothing in OFCCP's pace in

processing this matter would indicate that time is of such an essence that a small delay would in any way prejudice the Agency.

**IV. In the Alternative, the Court Should Allow the Limited Discovery Requested Below Within the Expedited (or Otherwise Modified) Hearing Procedures.**


If this Court decides not to remove this Complaint from the expedited hearing procedures, it should, in the alternative, grant the limited discovery requested herein to proceed under 41 C.F.R. § 60-30.2. Section 60-30.2 provides that “[u]pon notice to all parties the Administrative Law Judge may, with respect to matters pending before him modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.” 41 C.F.R. § 60-30.32. Pursuant to this rule, an Administrative Law Judge has the authority to waive or modify any rule promulgated and published at 41 C.F.R. § 60, including the expedited hearing rules. Consequently, an expedited hearing initiated by OFCCP may be removed from the expedited hearing process, in whole or in part, “in the Judge’s discretion.” *OFCCP v. Beverly Enterprises, Inc.* 1999-OFC-11, 2 (ALJ Sept. 6, 2001). Here, as noted above, the discovery requested by Google is limited to matters critical to its defense in this matter and the Court’s ability to render a decision, and allowing such discovery will not prejudice OFCCP. As such, if this Court denies Google’s motion to remove this action from the expedited procedures, it should, at the very least, grant Google’s request for limited discovery. Fairness and due process demand this result.

**CONCLUSION**

For the reasons set forth above, Defendant Google Inc. respectfully requests that the Court enter an Order removing this matter from the expedited hearing procedures and permitting Defendant to conduct written and testimonial discovery; or in the alternative, grant Google’s motion for limited discovery to occur within the expedited (or otherwise modified) hearing procedures.

Dated: January 24, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of January, 2017, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO REMOVE THE ADMINISTRATIVE COMPLAINT FROM THE EXPEDITED HEARING PROCEDURES, OR IN THE ALTERNATIVE, GRANT LIMITED DISCOVERY to be served by sending a copy of same via overnight delivery to:

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